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SUPREME COURT OF THE UNITED STATES

No. _____

ROBERT L. STARNES,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert L. Starnes, hereby petitions for a writ of certiorari to review the decision of the Fourth Circuit Court of Appeals made on December 13, 1973 which affirmed the decision of the District Court.

OPINIONS BELOW

The Fourth Circuit Court of Appeals' opinion decided on December 13, 1973 is appended hereto in the appendix. The District

Court made no written opinion. The Judgment of the District Court is appended hereto in the appendix. The opinion of the Fourth Circuit has not been officially reported at this time.

JURISDICTION

The order sought to be reviewed was made and entered on December 13, 1973. No petition for rehearing was made nor was there any extension granted to file this petition for certiorari. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Is it proper for a Court in a jury trial under the Federal Boiler Inspection Act to permit a railroad to question a railroad employee about the nature of his bank deposits when such questioning compels the railroad employee to disclose before the jury that he has been receiving Railroad Retirement Benefits?

2. Is there any requirement under the Federal Boiler Inspection Act to show the extent rather than just the presence of foreign matter on a locomotive or engine and has a railroad employee met the requirements of the Federal Boiler Inspection Act by showing the presence of foreign matter on a locomotive or engine?

STATUTE INVOLVED

"It shall be unlawful for any carrier to use or permit to be used on line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28 to 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." (See Title 45 U. S. C. A. Railroads Section 23, page 151 commonly known as the Federal Boiler Inspection Act).

STATEMENT OF THE CASE

The petitioner, an employee with the Norfolk and Western Railway Company, filed a complaint under the Federal Boiler Inspection Act alleging that he was injured while in the employ of the Norfolk and Western. The United States District Court in Norfolk had jurisdiction pursuant to Title 45 U. S. C. A. "Railroads" Section 56, page 296. The jury returned a verdict for the respondent, Norfolk and Western Railway, and the District Court entered judgment on the verdict. (see App. 1) The Fourth Circuit of Appeals affirmed the

decision of the District Court (see App. 2).[1]

Robert L. Starnes had been employed with the Norfolk and Western as a fireman and engineer for approximately fifteen years (App. on Appeal 60, 61). On April 25, 1971 Starnes reported to the empty yard at Lambert's Point, Norfolk, Virginia at 8:00 A. M. to work the eight to four shift (App. on Appeal 61). Starnes was the engineer, Bocock was the fireman (App. on Appeal 21), Trigleth was the conductor (App. on Appeal 45) and Mills and Henson were the brakemen (App. on Appeal 45). The crew's job that day was to make up trains of empty hoppers for their return to West Virginia (App. on Appeal 53).

When the crew picked up the locomotive (engine) that day they observed that the cab of the locomotive (engine) had not been cleaned (App. on Appeal 65, 101). The locomotive (engine) cab was described as being in a trashy condition (App. on Appeal 22). There were peanut shells, paper trash, dust, loose debris and dirt on the floor of the cab (App. on Appeal 22, 62). Starnes found a broom and swept out the center of the cab to the best of his ability (App. on Appeal 62, T-149). Evidence showed that locomotives (engines)

[1]Reference will be made in the following manner (App. on Appeal) means the printed appendix on appeal; (T -) means trial transcript; (App.) means appendix in petition for certiorari.

at the main yard were serviced and cleaned after each shift (App. on Appeal 65), but locomotives (engines) at the empty yard were not serviced and cleaned as often (App. on Appeal 127). This locomotive (engine) had not been serviced and cleaned after the shift that worked prior to Starnes (App. on Appeal 27, 37).

Starnes operated the locomotive (engine) when he first reported to work on April 25th, 1971. At 10:30 A.M. Starnes switched with Bocock, the fireman, who then operated the engine from the engineer's seat or side (App. on Appeal 22, 47, 67). Starnes was then seated in the fireman's seat (App. on Appeal 29, 47). The locomotive (engine) was stopped on Track 32 as Henson had just finished opening several knuckles or missed couplings on Track 31 (App. on Appeal 29, 46). The entire crew was in the cab of the locomotive (engine).

Starnes then told Bocock to hold the engine because he wanted to get on the running board so he could go to the bathroom (App. on Appeal 70). Starnes opened the fireman's door and put his right foot on the threshold of the door (App. on Appeal 71). Evidence showed that the threshold or sill was 2 1/2 inches wide and 7/16ths of an inch above the floor (App. on Appeal 126). The threshold could not be observed when the door was closed (App. on Appeal 74). The right foot of Starnes slipped with his heel catching the threshold (App. on Appeal 71). Both of Starnes feet went out from under him and he

fell out the fireman's door with his back hitting the threshold of the door (App. on Appeal 71). Starnes was able to catch a grab iron and stop his fall (App. on Appeal 71). Several members of the crew inside them helped Starnes back into the cab. Starnes was wearing clothing and shoes in conformity with Norfolk and Western's rules.

None of the crew actually saw Starnes slip, but several saw him falling out the doorway (App. on Appeal 30, 58). After Starnes fell, the crew noticed sand on the threshold (App. on Appeal 31, 49, 59, 60, 71). There was powdery ground up sand on the threshold (App. on Appeal 83). Bocock saw a deposit of loose and fine sand (crushed sand) in the doorway and threshold (App. on Appeal 31, 32, 42) with dirt also accumulated near the doorway (App. on Appeal 31). The threshold or sill was clear where Starnes had slipped, but had dust on either side (App. on Appeal 59).

No one had used the fireman's door prior to Starnes that morning (App. on Appeal 33, 57, 66, 74) and the fireman's door was closed when Starnes reported to work on the morning of the 25th (App. on Appeal 66).

The Norfolk and Western maintained that Starnes slipped because he hooked his heel on the sill, that there was no sand on the sill, and that it is normal to have some accumulation of sand in the cab. Norfolk and Western also attacked the credibility of Starnes.

Guy C. Kelly, the road foreman of engines, and trainmaster who took Starnes to the emergency room, maintained that Starnes said nothing to him about sand on the threshold (App. on Appeal 112, 113). Bundy, a junior engineer who inspected the cab shortly after Starnes' fall, indicated that he only took one exception to the condition of the cab - a newspaper on the floor (T-170). Emory Mutter, a machinist, found nothing to report (App. on Appeal 115) and Ralph White indicated that the sill was in normal condition (App. on Appeal 117, 118).

Norfolk and Western recalled Starnes as a witness (App. on Appeal 130). Starnes admitted that he had worked some odd jobs and had done some bookkeeping since April 25, 1971 (App. on Appeal 141). Starnes denied that he had steady income since November of 1971 (App. on Appeal 141). Norfolk and Western then inquired as to whether Starnes had been making steady deposits in his bank account (App. on Appeal 141). Counsel for Starnes objected. Out of the presence of the jury, Norfolk and Western showed Starnes his checking account records from November of 1971 until September of 1972. Starnes indicated that he had been receiving Railroad Retirement every two weeks (App. on Appeal 145) and couldn't recognize which deposits were from Railroad Retirement (App. on Appeal 146). The Court ruled that Starnes could be questioned about his deposits, but no mention should be made of Railroad Retirement (App. on Appeal 148). Counsel for Starnes objected because a number of the

deposits represented Railroad Retirement (App. on Appeal 148) and that permitting Norfolk and Western to examine Starnes about the deposits forced before the jury evidence of Railroad Retirement (App. on Appeal 151).

In the presence of the jury, Starnes was again asked that if since November of 1971 he had a steady stream of deposits into his checking account (App. on Appeal 152). Starnes replied that he had made six deposits between November of 1971 until he went back to work in January of 1972 (App. on Appeal 152). Starnes also admitted that after being discharged from the Railroad his deposits averaged four or five a month (App. on Appeal 152). Norfolk and Western then asked:

By Mr. Prince:

Q. Now, can you tell us where all of this income has come from that you have been depositing? (App. on Appeal 153) (Emphasis Added)

By Mr. Starnes:

A. Well, some of it is from loans that I had made at the bank; some of this is from railroad sickness benefits. At one period of time...I don't believe that's on here... (App. on Appeal 153).

By Mr. Prince:

Q. And then sometimes from railroad

sickness benefits?

By Mr. Starnes:

A. Yes, sir (App. on Appeal 156).

During the presentation of instructions to the Court, Starnes objected to Norfolk and Western's charge referring to the small amount of sand (App. on Appeal 9). The Court recognized that this was a proper objection (App. on Appeal 9). The jury was then instructed as to whether the existence of the sand put the locomotive in an unsafe condition (App. 6, 7).

However, after the jury had been deliberating, it returned to the jury box to ask the Court whether the design of the fireman's door complied with the Boiler Inspection Act. The Court stated that the design did comply and then said:

> "The sole question you have relates to the question of sand, if any, and the extent of the sand, and so on, on the steps and threshold." (Emphasis Added) (App. on Appeal 12).

Counsel for Starnes objected to the trial Court instructing the jury on the extent of the sand (App. on Appeal 13). After this instruction by the Court, the jury returned a verdict for Norfolk and Western eight minutes later (App. on Appeal 2).

REASONS FOR GRANTING WRIT

First of all, this Court has held that the admission of evidence of Railroad Retirement benefits or other collateral benefits in a trial for personal injury is prejudicial error no matter what the purpose was for showing the receipt of Railroad Retirement benefits. See Eichel v. New York Central Railroad Co. 375 U.S. 253, 84 S. Ct. 316, 11 L. Ed 2d 307 (1963). See Tipton v. Socony Mobil Oil Co., Inc. 375 U.S. 34, 37 84 S. Ct. 1, 11 L. E. 2d 4 (1963). In Eichel v. New York Central Railroad Co., supra, p. 317, the Supreme Court stated in a per curiam opinion that evidence of Railroad Retirement had to be excluded even for impeachment purposes.

> "In our view the likelihood of misuse by the jury clearly out weighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937 50 Stat. 309 as amended, 45 U.S.C. Section 228B (a) 4 were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act..."

> "Similarly, we must recognize that the petitioner's receipt of collateral, social insurance benefits involves a substantial likelihood of prejudicial impact."

Other Circuits have held that it was prejudicial error to introduce Railroad Retirement benefits to attack an employee's credibility and his motive not to return to work. See Caughman v. Washington Terminal Company 345 F. 2d 434 (D. C. Circuit 1965). This Court has even held that evidence of collateral benefits is prejudicial error where the jury gave a defendant's verdict and never reached the issue of damages. See Tipton v. Socony Mobil Oil Co., Inc., supra, page 3 where the Supreme Court stated

> "We disagree with the suggestion of the Court of Appeals that the prejudicial affect of the evidence of other compensation would be restricted to the issue of damages, and would not affect the determination of liability."

The cautioning charge of the District Court Judge telling the jury to disregard the evidence of Railroad Retirement does not render the error harmless. See Page v. St. Louis, South-Western Railway Co. 349 F. 2d 820 (5th Cir 1965).

Starnes did not voluntarily inject Railroad Retirement before the jury. The evidence of Railroad Retirement came in after Starnes had objected to questioning about

his bank deposits because it would bring before the jury evidence of Railroad Retirement benefits and only when Starnes replied to a question of the Norfolk and Western asking where all of his income has come from. Even though Starnes himself mentioned Railroad Retirement benefits, the answer was required by the question of Norfolk and Western. Certainly the decisions of this Court which prohibit evidence of Railroad Retirement for any purpose cannot be circumverted by allowing a railroad to ask a question which requires the employee in his answer to mention Railroad Retirement benefits and then say there is no error since the employee voluntarily brought Railroad Retirement before the jury.

Secondly, neither the Federal Boiler Inspection Act nor any case law requires an employee to show the extent of a foreign substance on a locomotive or any part in order to prove a violation. Here the trial Court's instruction to the jury that they had to be concerned with the extent of the sand was contrary to the requirements of the Federal Boiler Inspection Act.

In Lilley v. Grand Trunk R. Co. 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 411 (1942), the Supreme Court found that a tender covered with ice where employees must climb involved unnecessary peril to life or limb. The Supreme Court specifically stated that negligence is not the basis of a suit under FBIA and that the FBIA "imposes upon the carrier an absolute and continuing duty to maintain the locomotive and all parts and appurtenances

thereof in proper condition and safe to operate. ..without unnecessary peril to life or limb." Lilley, supra. Under this Act no notice to the railroad, either constructive or otherwise, is required and it makes no difference whether the condition arises along the way while the locomotive is in use. See McCarthy v. Pennsylvania R. Co. 156 F. 2d 877 (7th Cir, 1946). None of the cases under the Federal Boiler Inspection Act have gone into the question of the amount of foreign matter, or required an employee to prove the extent of the foreign matter. See St. Louis, Southwestern Railway Company v. Williams 397 F. 2d 147 (5th Cir 1968) where the Court found there was sufficient evidence to support a violation of the FBIA where the employee slipped on oil on some steps. In Gowins v. Pennsylvania R.R. 299 F. 2d 431 (6th Cir. 1962), the Court held that the Act gives protection against the presence of dangerous objects or foreign matter. See also Annot. 90 A.L.R. 2d 599 and supplements. In Calabritto v. New York, New Haven and Hartford R. Co. 287 F. 2d 394 (2nd Cir. 1961), the Circuit Court held there was liability for the dangerous condition caused by the temporary presence of foreign matter.

> "So the use of an engine whose surface has been made slippery by sand and oil may similarly be found by a jury to involve unnecessary peril to life or limb in violation of the FBIA."

CONCLUSION

Petitioner submits that this Court should grant certiorari in order to insure that its previous rulings excluding evidence of Railroad Retirement benefits are not circumvented by the practice of asking a question which compels the railroad employee to disclose before the jury the fact that he has been receiving Railroad Retirement benefits. Secondly, the decided case law by this Court and other Circuits throughout the country only requires an employee to show that the presence of foreign matter and not the extent of foreign matter made the locomotive in an improper condition and unsafe to operate thereby exposing the petitioner to unnecessary peril. The trial Court's instruction to thejury telling them to be concerned with the extent of sand was contrary to the meaning of the Federal Boiler Inspection Act.

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Raymond H. Strople

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CERTIFICATE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of Robert L. Starnes v. Norfolk and Western Railway Company were deposited in the United States mail, first class, prepaid to William T. Prince, Esq. at his office of Williams, Worrell, Kelly and Worthington, P. O. Box 3416, Norfolk, Virginia 23514 on the 22 day of February, 1974. It is further stated that the petition has been served on all parties.

Raymond H. Strople

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

ROBERT L. STARNES,

Plaintiff,

v.

CIVIL ACTION NO.
76-72-N

NORFOLK AND WESTERN
RAILWAY COMPANY,

Defendant.

FINAL JUDGMENT

Upon consideration of the plaintiff's motion to set aside the verdict of the jury heretofore rendered on October 12, 1972, in favor of said defendant, and upon further deliberation following the argument of counsel on June 8, 1973, it is

ORDERED that the plaintiff's motion to set aside the verdict of the jury be, and the same hereby is, DENIED, and final judgment is hereby rendered in favor of the defendant with costs assessed against the plaintiff.

The plaintiff duly excepts to the ruling of the Court in this matter.

The Clerk will forward certified copies of this final judgment order to Dennis F. McMurran, Esquire, and William T. Prince,

Esquire, counsel of record for the respective parties.

Walter E. Hoffman
United States District Judge

At Norfolk, Virginia
June 8, 1973

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-2021

ROBERT L. STARNES,

Appellant,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
Walter E. Hoffman, District Judge

(Argued December 3, 1973. Decided December 13, 1973)

Before BUTZNER and FIELD, Circuit Judges,
and TURK, District Judge

Raymond H. Strople (Dennis F. McMurran and Moody, McMurran and Miller on brief) for appellant; William T. Prince (Williams, Worrell, Kelly and Worthington on brief) for appellee.

Per Curiam:

Upon consideration of the briefs, record and oral argument, we find no reversible error.

AFFIRMED.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73- 1306

ROBERT L. STARNES
Petitioner

V.

NORFOLK AND WESTERN RAILWAY COMPANY
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-1306

ROBERT L. STARNES,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

BRIEF IN OPPOSITION
TO
PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent, Norfolk and Western Railway Company, files this brief in opposition to the petition for writ of certiorari filed by the petitioner herein and asserts that none of the reasons set forth in Rule 19(b) apply to this case and that this Honorable Court should not grant a writ of certiorari.

QUESTIONS PRESENTED

1. May a plaintiff in a Federal Employers Liability Act case, who is previously cautioned not to do so, voluntarily inject evidence of the receipt of Railroad Retirement Board benefits

and thereafter assert prejudicial error as a result of his disregard of the admonition?

2. Did the trial court misinstruct or erroneously explain its prior charge to the jury when it responded to a question from the jury?

STATEMENT OF THE CASE

Nature of the Case

Plaintiff filed his complaint alleging the defendant was guilty of negligence in violating the Federal Employers Liability Act and was guilty of violating the Boiler Inspection Act (which does not require proof of negligence). During the discussion concerning the proposed charge, the plaintiff abandoned his claim of negligence under the Federal Employers Liability Act and proceeded on his claim of violation of the Boiler Inspection Act. (Trial Transcript, page 232) The jury returned a verdict for the defendant.

FACTS

The petitioner will be referred to in this section as the plaintiff, the position he occupied in the trial.

The plaintiff and his fireman testified that the interior of the locomotive cab was dirty with peanut shells, trash, dust and debris when they started their shift, but the conductor, Irving Trigleth, who was in charge of the crew and had been a conductor for sixteen of his twenty-one

years with the Railway Company, and who was called by plaintiff as a witness, testified that it is the practice and custom for the engineer (the plaintiff) to sweep the cab out before the tour began. (51. All references hereafter are to the appendix filed in the Court of Appeals.) Complying with the custom, the plaintiff said, ". . . I took the broom and swept it all out myself, but I swept it all out the rear door of the engine--the paper and everything--and tried to get most of the dirt that I could see in that area, and most of this dirt was right in the center of the cab and on the engineer's side, and I swept it out on the back running board and then I swept the running board off." (62)

The locomotive is equipped with boxes for the storage of sand used to aid traction. (66, 127-128) When the sand is deposited on the rail and run over by the wheels of the locomotive it becomes powdery (129) and the plaintiff stated that "this powdery ground up sand" was on the stainless steel threshold of the cab door causing him to slip. (83) The conductor testified that it is normal for a certain amount of dust and sand to accumulate on the floor of the cab. (50) The plaintiff fell three hours after the shift began. (20-21)

The plaintiff's testimony at the trial was that he slipped on the threshold and while slipping caught the heel of his shoe on the threshold. (71, 91) However, plaintiff introduced into evidence a personal injury report he filed. (74-75, Plaintiff's Exh. 7) In his own handwriting he reported:

> This C.T. 37 form is submitted because of apparent lack of information on the first form turned in by Mr. Kelly. This is to ensure that all pertinent facts and witnesses in this case are correct and identifiable. (91)

The form had a question: "What was said by injured person as to cause of accident and extent of injuries?" The plaintiff wrote:

> Hooked heel of shoe on protruding edge of threshold of step on engine 37 causing me to slip and strike the lower part of my back on the step. Step was on fireman's side of engine and had a small amount of sand on it. (92)

The form also provided a "Remarks" section: "Remarks: Give full particulars as to how accident occurred." Again, the plaintiff wrote:

> Engineer R. L. Starnes attempted to exit from door on fireman's side of engine and hooked heel of shoe on raised portion of threshold causing him to slip and fall, striking the lower portion of his back on the steel threshold, causing apparent injury. Small amount of sand was on threshold step. (92-93)

Guy Kelly, who had general supervision over plaintiff's work, took him to the hospital. He testified that plaintiff

explained to him "that his shoe had caught and he tripped and fell out the door." (113) Kelly said plaintiff made no mention of the condition of the cab. (113) Kelly inspected the walkways, the steps and the cab and took exception to nothing. (113)

Emory Mutter, a machinist called to inspect the locomotive, looked over the whole unit and found nothing wrong. (114-115)

Ralph White, roundhouse shift foreman, made a complete inspection including the condition of the sill at the fireman's door and found it to be in a normal condition. (117-118)

An issue not raised in the pleadings or in the final pre-trial order was injected by plaintiff's attorney in his opening statement. He stated to the jury:

> The fireman's door had not been opened that morning, and when Mr. Starnes went up and opened the door, there was a rise on the bottom of this door, which will be called the threshold, which will vary anywhere from three-eighths of an inch to a half an inch rise; and, actually, this was a rise from the floor and this rise--actually, there wasn't anything underneath this. This was a rise that occurred; that it should have been, it will be our contention, flush with the floor; that there wasn't anything between it, and there was a rise this high. It was a strip. You

> think of any door that has a strip under it or--this had actually come up and that Mr. Starnes had to actually step over this rise in order to get on the steps that go right down on the running board. (15)

Following this opening statement and before the opening statement of the Railway Company's counsel, there was a conference out of the presence of the jury concerning this new contention. At that time, plaintiff's counsel stated, "We are not asking the jury to say that that was not a proper appurtenance. All we are saying, he had to step up." When advised that he indicated to the jury his contention was that the sill should have been flush with the floor, he stated, "Well, if I said that, I didn't mean to go that far on the thing." (18) It was agreed that Railway's counsel would advise the jury in his opening statement that there was an agreement that no contention was made concerning the construction of the locomotive and that plaintiff's counsel's statement was inadvertent. (18-19)

The plaintiff's credibility was much in issue and will be referred to hereafter. In nearly every instance, the plaintiff, himself, would inject matter prompting an attack upon his credibility.

When asked if he had worked for the railway since the accident, the plaintiff stated that he worked about fourteen days in February, 1972 but was then fired "because I instituted suit against them." (79) Plaintiff returned to work on January 13, 1972 and was fired on

February 8, 1972 (94) following a formal investigation into his whole work record. On cross-examination, he denied having any knowledge that a hearing to consider his work record had been pending since shortly after the accident. (94, 130) Plaintiff was shown a copy of a letter dated April 28, 1971 (three days following the accident) advising him that a formal investigation into his work record, including his most recent accident and eleven other accidents, would be held on a given date and inviting him to have witnesses and a representative present. His signature acknowledging receipt of the notice was on the copy of the letter and he verified it at the trial. (136-137) He also acknowledged his signature on another letter advising him of the postponement of the hearing. (137-138)

Plaintiff was questioned at the trial concerning statements made at the Railway Company's formal investigation which appeared to be inconsistent with his trial testimony. He explained that he had been refused a copy of the transcript of the investigation and his representative had also been refused a copy. (104, 138) But he then modified his testimony and said he received one or two pages of the transcript and was asked to make corrections. (138) Then he modified his testimony again and said it was possible he had received the transcript of his testimony but "I wasn't sure that it was my entire testimony." He was shown and acknowledged a sheet of paper in his own handwriting where he requested a slight modification of the final copy of the transcript. (140)

At the trial, plaintiff testified he had not returned to see Dr. Goldner at Duke University because Dr. Goldner had told him that he would have "pain probably for many months or even possibly the rest of my life. He said it was up to me, the degree of pain I could stand." (97) His discovery deposition was brought to his attention where he stated: "The bill is quite expensive down there when you go down there, and I really would have liked to go see him again to tell him I still have pain, but I just can't afford to go down there." (98) He attributed the inconsistency in his testimony to nervousness and explained, "I don't know why I made the statement that I couldn't afford it, because I could have afforded to go down there." (98)

Plaintiff testified that from April 25, 1971 (the date of the accident) until January 13, 1972 (the date he returned to work) he had earned only $328.67 in other jobs. (80) He also testified that since February, 1972, when he was discharged by the railway company, he only had done some odd jobs and had sought employment by other railroads without success. (107) Again, he was referred to his discovery deposition wherein he swore that since being fired he had been employed no where, had done a "little housework, a lot of reading, riding around. . . But I am unable to take a job and do the work that it would require me to do in another occupation to make the same amount of money that I was making on the railroad." Also, he had said he had not applied for work anywhere. He explained these inconsistencies as caused by misunderstandings of the question. (108)

The plaintiff was asked on cross-examination if it was not true that since November, 1971 he had been making steady deposits into his checking account. He replied affirmatively. (141-142) There was a lengthy discussion out of the presence of the jury concerning the bank statements and the sources of the deposits made by the plaintiff from November, 1971 through September, 1972 (the time of the trial). (142-152) During this discussion, the plaintiff testified he received Railroad Retirement Board checks, that several large deposits came from bank loans and "four, five, six, seven times a month" he would take cash from a box he kept at home and make deposits. The amount he kept in the box at home varied. "Sometime get as low as a thousand dollars, and at times I have as much as four thousand; four thousand, five hundred, in there." (147) Defendant sought admission of the testimony as affecting the plaintiff's credibility and the trial judge commented: "Obviously, a man who tells a story like that, the jury is entitled to hear it." (148)

Plaintiff's attorney objected to the evidence on the ground that "part of that money on those statements obviously came from railroad retirement." (148) The trial court advised plaintiff's attorney that the bank statements, themselves, would not go into evidence and that "we are not going into a detailed accounting." Counsel for Railway twice cautioned the plaintiff. First, "I will ask you nothing about railroad retirement benefits." (T. 148) Secondly, "Let me just caution you, Mr. Starnes. When I ask you about these deposits, you need not mention anything came from railroad retirement." (150-151)

The trial court cautioned: "If Mr. Starnes himself wishes to inject into this case that he did receive railroad retirement benefits, then I say to him that the courts have consistently ruled that such evidence is not admissible. . . So it is just up to Mr. Starnes and Mr. McMurran as to whether anything is said about the railroad retirement benefits." (151)

Plaintiff's counsel argued that plaintiff was being forced to go into the matter of the retirement benefits. The court replied: "If Mr. Prince asks you anything directly about railroad retirement benefits, I will agree with you; otherwise Mr. Starnes is not forced to go into it." (151-152)

In the presence of the jury, plaintiff testified that from November, 1971 until he returned to work he made six deposits and from the time he was discharged from his job until a month prior to the trial he averaged four or five deposits a month. (152-153) When asked the source of the deposits, he stated that the funds came from six sources: Loans; railroad sickness benefits; his daughter; his sixteen year old son; cash kept at home in a locked box in his bedroom; unemployment compensation. (153-154) He did not identify the odd jobs as a source of any of the deposits.

At the conclusion of the plaintiff's testimony, the trial court admonished the jury not to consider the railroad retirement benefits, even though the evidence was brought out by the plaintiff, himself. (159)

ARGUMENTS

1. May a plaintiff in a Federal Employers Liability Act case, who is previously cautioned not to do so, voluntarily inject evidence of the receipt of Railroad Retirement Board benefits and thereafter assert prejudicial error as a result of his disregard of the admonition?

The plaintiff testified that prior to returning to work on January 13, 1972 his earnings were only $328.67 and subsequent to his discharge by the railway company on February 8, 1972 he only had had odd jobs and was unable to get employment with other railroad companies. This testimony was inconsistent with his pre-trial testimony that he was unable to take a job and was confined to doing housework, reading and riding around. (It should also be noted that plaintiff continued to claim for lost wages subsequent to January 13, 1972 until the proceedings out of the presence of the jury were held concerning the scope of the cross-examination of the plaintiff about the source of his bank deposits. At that point, he disavowed any claim for lost wages subsequent to that date. But even then, his attorney asserted, "We still say he has injury, but we don't say it is permanent." (144))

The petitioner's testimony was sprinkled with gratuitous remarks and statements repeatedly contradicted. His credibility became an important issue and the cross-examination concerning the source of his bank deposits became all the more important to this issue when he explained out of the hearing of the jury that he kept large sums of money (the

source of which was never explained) in a locked box in his bedroom. He sought to impress the jury with the seriousness of his injury by suggesting that he was limited to doing odd jobs. It was not until his bank statements had been subpoenaed that he even admitted an ability to do any work. One month prior to trial, in a deposition, his contention was that he was unable to do anything.

After asserting that he was fired because he had sued the railway company, petitioner denied that he ever had knowledge of an investigation which had been pending ever since the accident relative to his entire work record. Yet, on cross-examination he acknowledged receipt of the notice of such an investigation. He also testified that he was never given the opportunity to review the transcript of the hearing conducted by the railway company which resulted in his discharge. Evidence was introduced that he had reviewed the transcript and requested certain changes to be made in it. Also, he denied certain statements he made at the hearing conducted by the Railway Company and was contradicted by the shorthand reporter who took the testimony verbatim. In short, the petitioner's credibility was much in issue.

At the trial, plaintiff's attorney argued that if the plaintiff was questioned about the deposits it would disclose that he had received benefits from the Railroad Retirement Board. It was made perfectly clear by the trial court that testimony concerning Railroad Retirement Board benefits was not admissible and the plaintiff was cautioned that he should not mention those amounts. Counsel

for the railway company likewise advised the plaintiff that his questions were not aimed at disclosure of Railroad Retirement Board benefits and that he should not so respond in answering the questions. The bank deposit statements, themselves, were not being introduced into evidence and benefit deposits did not have to be explained. However, plaintiff's counsel argued that the plaintiff was being forced to disclose those benefits.

When the jury returned and the cross-examination proceeded, the plaintiff immediately began the explanation of the source of the money deposited into his account by mentioning "railroad sickness benefits." He also stated that other sources were loans from the bank, amounts received from his daughter, amounts received from his son, the money he kept at home and unemployment compensation benefits.

If the petitioner was prejudiced by his voluntary mention of railroad retirement benefits, the time to act would have been at the time the evidence came out by a motion for a mistrial. By waiting until the return of the jury with its verdict for the defendant, the plaintiff waived any right to claim error.

The petitioner also argues that by allowing examination concerning his bank statement he was "required" to mention the unmentionable. Indeed, if petitioner felt constrained to mention the benefits, the force was exerted by his own counsel who said in the presence of the plaintiff at the conclusion of the lengthy discussion concerning the evidence, "For the record, we would put on there that we are forced

to go into any matters that we feel are inadmissible as far as railroad retirement because of the ruling." (151)

The cases cited by the petitioner hold that it is improper to impeach or impute motives to a railroad worker by eliciting testimony that he was the recipient of Railroad Retirement Board benefits. Respondent does not argue that evidence of Railroad Retirement Board benefits is admissible or that the cases cited by the petitioner do not hold as he contends. However, no cases are cited by the petitioner to the effect that a plaintiff who voluntarily injects inadmissible evidence, especially after being repeatedly cautioned that he need not do so, may thereafter complain because he volunteered such inadmissible evidence. Such a ruling would afford a plaintiff the right to force a mistrial in any case by simply volunteering the inadmissible evidence, or as in this case, by awaiting the outcome of the jury's verdict and then seeking a new trial. In most negligence cases, a mistrial is called for if a plaintiff injects evidence that the defendant is insured. However, if the defendant volunteers the information he cannot complain.

2. Did the trial court misinstruct or erroneously explain its prior charge to the jury when it responded to a question from the jury?

In the final pre-trial order, the petitioner's factual contentions were that the railway company violated the Boiler Inspection Act and/or the Federal

Employer's Liability Act. At the trial, the petitioner abandoned his claim under the Federal Employer's Liability Act, which would have required the proof of negligence and would have afforded the railway company the partial defense of contributory negligence. Instead, he chose to pursue the violation of the Boiler Inspection Act which did not require proof of negligence and to which contributory negligence is no defense.

The factual contentions set forth in the final pre-trial order by the petitioner concerning violation of the Boiler Inspection Act were that there was "an accumulation of sand, dirt and grit on the floor, steps and threshold" of the engine. There were no other factual contentions to support a violation of the Boiler Inspection Act.

In his opening statement, petitioner's counsel stated that he would prove that the petitioner slipped because "there was sand and dirt in this area [the cabin door threshold] and other foreign material." (15) He also stated that at the threshold there was a strip "anywhere from three-eighths of an inch to a half an inch" which should have been "flush with the floor." At the conclusion of the opening statement by petitioner's counsel, both counsel conferred with the court concerning the contention of a defect in the doorsill. Petitioner's counsel advised the court that he was "not asking the jury to say that this was not a proper appurtenance. All we are saying, he had to step up." (18) It was also agreed that the railway company counsel in his opening statement would advise the jury that there was no contention of a defective doorsill.

Apparently, the jury was not then dissuaded.

The plaintiff's evidence was that his foot slipped on the accumulated sand, causing him to fall. Therefore, the court charged the jury that: "Under the circumstances of this case, the existence or not of the amount of sand at the steps and threshold of the cabin is all you may consider in determining if the railway violated this duty [that is, to provide the plaintiff with a locomotive in proper condition and safe to operate in the service to which it was put, and that it may be employed in the active service of the railway without unnecessary peril to life or limb.] There is no claim and no evidence to support any claim that this locomotive was improperly constructed in any manner." (6) No objection was taken to this charge. Indeed, it was a simple and concise statement of the plaintiff's theory of his case. The court also fully charged the jury, as requested by the plaintiff, concerning the railway company's duty under the Boiler Inspection Act. (5-7)

The jury began its deliberations at 4:10 p.m. At 5:50 p.m., the jury returned with a question as follows: "Does the entrance/exit through fireman's door (engineering design) comply with the 'Boiler Act' in question?" After reading the question to counsel out of the presence of the jury, the court stated, "I think the answer is obvious. . . I told them that the only thing they had to consider was the question of the sand." (11) Counsel for the plaintiff remained silent. The jury was brought in and the court reminded them that "I have told you that you

are not concerned with the actual construction or design of the engine. The sole question you have relates to the question of sand, if any, and the extent of the sand, and so on, on the steps and threshold." The jury indicated that the court had answered its question. (12)

The court's response to the jury's question was not confusing and in no way changed the formal charge previously given to the jury, to which no objection had been made. In his formal charge, the trial court advised the jury that they were only to consider "the existence or not of the amount of sand at the steps and threshold of the cabin." When, in response to their question, the trial court reminded the jury only to consider "the question of sand, if any, and the extent of the sand, and so on, on the steps and threshold," he was not injecting a greater burden of proof upon the plaintiff. To say "the question of sand, if any, and the extent of the sand," is to say no more than "the existence or not of the amount of sand." The petitioner's argument now is nothing more than a quibble, and one without merit, at that.

It was apparent from the question that the jury was concerned about whether there was a contention that the structural design of the threshold violated the Federal Boiler Inspection Act. The idea was implanted in the mind of the jury in the opening statement of plaintiff's counsel. In his first remark in response to the question, the trial judge said, "I have told you that you are not concerned with the actual construction or design of the engine." (12) No objection was made to that response.

It is beyond the pale to believe that the trial judge's response to the jury's question about structural adequacy was misinterpreted. Petitioner suggests that the prejudicial impact of the court's response was shown by the return of the jury eight minutes after the question was answered. It is much more obvious that the quick return of the jury disclosed their confusion over whether there was an issue of defective design.

The cases cited by the petitioner in support of his argument deal generally with the sufficiency of the evidence to sustain a verdict based upon violation of the Boiler Inspection Act. No issue is taken as to the holdings of those cases; however, they fail to meet the issue raised in this appeal.

CONCLUSION

It is respectfully submitted that the trial court committed no error in the particulars raised. The plaintiff received a fair trial about which he can not properly complain. The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that three printed copies of the Brief in Opposition to Petition for Writ of Certiorari in the case of Robert L. Starnes v. Norfolk and Western Railway Company were deposited in the United States mail, first class, prepaid to Dennis F. McMurran and Raymond H. Strople at their office of Moody, McMurran & Miller, P. O. Box 1138, Portsmouth, Virginia 23705 on the 20th day of March, 1974. It is further stated that the brief in opposition has been served on all parties.

William T. Prince

William T. Prince